



Legislative Update

Covering Criminal Justice Legal Issues

Department of Public Advocacy

No.1, 1998

Funding for DPA

Funding for Kentucky public defenders is not adequate for the nearly 100,000 clients represented yearly. DPA's per case funding is the lowest in the country. Statewide juvenile representation by defenders was criticized in November 1996 by the Children's Law Center, Inc. of Northern Kentucky in a statewide study, *Beyond In Re Gault: The Status of Juvenile Defense in Kentucky* for the inadequacy of DPA's representation of juveniles. DPA was criticized for placing inexperienced lawyers in juvenile court, having untrained part-time lawyers in juvenile court, and most seriously for having a large percentage of juveniles without lawyers of any kind at the time of their case. Additional full-time staff; additional funds for contract counties, and additional education for specialized juvenile litigation are required to meet the identified statewide juvenile inadequacies.

To provide adequate representation for DPA clients, \$3 million additional yearly are being requested to:

- Enhance quality of juvenile representation statewide by providing:
 - 5 new full-time offices;
 - additional juvenile trial lawyers in existing offices;
 - a juvenile trainer;
 - more juvenile appellate lawyers;
- Fund Jefferson and Fayette County Public Defender Offices to achieve caseload and salary parity;
- Fund the capital post-conviction branch which lost federal funding;
- Provide new appellate lawyers.

The need for these additional funds are compelling:

- DPA provides a constitutionally required service.
- DPA handled nearly 100,000 cases in FY 97 at \$170 per case, the lowest funded public defender agency in the nation.
- Caseload increased by 6% last year.
- High caseloads and insufficient resources have particularly affected DPA's ability to provide adequate representation in juvenile court.
- The deficit in juvenile representation occurs at a time of increased penalties and rising juvenile caseloads.
- DPA needs additional resources to meet its constitutional obligations particularly in juvenile court.
- DPA's goal is to cover 85% of the case-load through full-time public defenders.
- DPA's urban offices handle a very large percentage of defender cases in Kentucky and they need additional resources to reduce unethically high caseloads.
- DPA needs resources to replace lost federal funding to meet its obligations to represent death row inmates.

Prosecutor's Receive \$2 Million to Convert to Full-Time

In 1996 House Bill 160 provided \$2,091,300 to Kentucky prosecutors to convert 22 Commonwealth Attorneys from part-time to full-time, providing improved effectiveness and efficiency. Full-time prosecutors cover 64 counties compared to 50 counties covered by full-time defenders.

From the Public Advocate:

DPA is working to have three legislative initiatives implemented by the 1998 Kentucky General Assembly: 1) DPA's request for a 15% increase in its General Fund appropriations; 2) a series of changes to KRS Chapter 31, and 3) death penalty legislation. Each are described in this issue and need your support.

Funding. DPA has been chronically under-funded. We have received a continuation bud-get for the last three years at a time that our caseload was going up. High caseloads are threatening the quality of services being delivered by conscientious but overworked public defenders. Our request is a modest one which would enable us to go from \$170 to \$190 per case funding, still one of the lowest in the nation. It would enable us to narrow the gap with prosecutors, who now receive over three times the moneys going to public defense.

Administrative. KRS Chapter 31 needs to be rewritten in its entirety. In the meantime, there are several areas which need to be improved. First, our administrative bill would eliminate the nolonger applicable hourly and case maximum rates, which became anachronistic with the elimination of the assigned counsel system. It would increase the administrative fee from \$40 to \$50. It would bring Jefferson County into the KRS 31.185 Superfund, as well as providing for the Superfund to pay for *Lincoln County* cases. This is a reasonable package that would allow DPA to do its job better.

Death Penalty. The ABA's Moratorium Call acts as a moral statement condemning the Ken-tucky death penalty until change is made. DPA is advocating for legislation that would address a number of the problems identified by the ABA: the Racial Justice Act, the abolition of the death penalty for juveniles, and makes retroactive the abolition of the death penalty for persons with mental retardation.

Contact your legislator on these legislative initiatives and express your opinion. Legislators deserve to know your views. Together, we can influence a better Kentucky criminal justice system.

Ernie Lewis, Public Advocate

Racial Justice Act

Senate Bill 171 sponsored by Senator Gerald Neal of Louisville and an identical House Bill sponsored by Representative Jesse Crenshaw of Lexington fix one of the deficits in Kentucky's capital scheme identified by the American Bar Association's Call for a Moratorium. The bill creates a pretrial process to have a judge determine whether race is a part of a capital prosecution.

ABA Resolution Calls for Moratorium. By a 280-119 vote, the ABA House of Delegates in a February 3, 1997 Resolution (No. 107) called for a moratorium on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially and in accordance with due process to minimize the risk that innocent persons may be executed. Far from being administered fairly and reliably, the death penalty in this country, according to the ABA, is "instead a haphazard maze of unfair practices with no internal consistency." Kentucky mirrors that national reality. The ABA resolution establishes a legal position on fairness in the application of the law; it is not a policy statement for or against the penalty. The ABA's call for a suspension of executions focuses on: 1) incompetency of counsel; 2) racial bias; 3) mentally retarded persons; 4) persons under 18 years of age; and, 5) preserving state & federal post-conviction review. In light of the Kentucky reality, changes in Kentucky statutes must be made to correct the unfair implementation of the law.

Discrimination Exists in Kentucky Capital Sentencing on the Basis of the Race of Either the Victim or Defendant. There are 7 African-Americans on Kentucky's death row of 31. This represents 22% of the death row population, compared with Kentucky's non-white population of 7.7%. All the victims of these 7 death row inmates were white. A study commissioned by the 1992 Kentucky General Assembly of all homicides between 1976 and 1991, Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing* (Sept. 1993), demonstrates race is a factor in Kentucky capital sentencing. Defendants were more likely to be sentenced to death if their victims were white, most especially if the defendant was black. A Racial Justice Act provides a method to eliminate race from the death process by allowing a judge to consider the evidence before trial.

Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act, (35 Santa Clara L. Rev. 519, 520 (1995), Erwin Chemerinsky.

"What if 65% of the applicants for positions in a government office were African-American, but 80% of those hired were white? A black applicant certainly could bring a suit under Title VII of the 1964 Civil Rights Act and force the employer to show that race was not a factor in the hiring decisions.

"What if the prosecutor used peremptory challenges to strike prospective jurors who were black four times more than to exclude those who were white? Under *Batson v. Kentucky*, 476 U.S. 79 (1986), it is clear that the defense could require the prosecutor to demonstrate that the peremptory challenges were not exercised based on race.

"What if more than 60% of murder cases involved African-American victims, but in cases where the death penalty is sought more than 80% involved white victims? What if an African-American who kills a white victim is more than five times as likely to be given the death penalty than a white who kills a white? What if an African-American who kills a white is 60 times more likely to be sentenced to death than an African-American who kills an African-American? Does the law require that this racial disparity be explained on non-racial grounds? It should, but as of now, it clearly does not.

"In almost every important area – employment, housing, public benefits, peremptory challenges – proof of racially disparate impact can be used to require the government to prove a non-racial explanation for its actions. Not, however, with regard to the one area where the government determines who lives and who dies.

Bills, which are expected to be introduced, relating to the death penalty and juveniles and the mentally retarded will be discussed in the next issue.

**FY 1998 Criminal Justice Budgets,
Total Funds**

Agency	%Total	Total Funds
Corrections	38.70%	\$263,656,200
Judiciary	19.28%	131,355,400
State Police	16.15%	110,073,400
Juv. Justice	10.26%	69,921,300
Prosecution	7.91%	53,899,000
Justice Admin.	5.19%	35,383,800
DPA	2.51%	17,077,500
TOTAL	100%	\$681,366,600

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* = Members of Subcommittee that considers DPA
Budget

KRS Chapter 31 Administrative Bill

House Bill 337 sponsored by Representative Kathy Stein makes administrative changes to update KRS Chapter 31 to current realities and make other changes. The 7 modifications to the chapter are:

- 1) The anachronistic hourly rates of \$25 for out-of-court and \$35 for in-court work and case maximums of \$500, \$1,000, \$1,250 are eliminated by this bill, and replaced with the prevailing rate set by the Public Advocate.
- 2) The administrative fee paid by defendants is raised from \$40 to \$50 to further fund statewide defender programs.
- 3) The bill requires a judge to waive or reduce the administrative fee if the defendant lacks the financial ability to pay it.
- 4) The bill proposes collecting administrative fees through civil judgments.
- 5) Responsibility for the funds for resources provided pursuant to *Lincoln County Fiscal Court v. Sanders*, 794 S.W.2d 162 (Ky. 1990) will be shifted from DPA's budget to the current special account fund of KRS 31.185 which is funded by a per capita county contribution of \$0.125.
- 6) It brings Jefferson County into the statewide special account in KRS 31.185 for funds for experts and resources with the other 119 counties.
- 7) It allows AOC to provide DPA with an electronic rather than a paper version of the orders collecting fees.

Funding comparison, 1997-98

Ky. Public Defenders	\$17.1 million
Ky. Prosecutors	\$53.8 million